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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-364

JOAN S. MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, *et al.*,

Appellants,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Three-Judge Court)

BRIEF OF APPELLEES THORNTON, *et al.*

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I.

The Thornton appellees are black voters in the five Virginia cities of Richmond, Norfolk, Portsmouth, Hampton and Newport News. In the district court they alleged and sought to prove that the multi-member districts assigned to those cities in the reapportionment of the House of Delegates operated to minimize or cancel out their voting strength, within the meaning of this Court's decisions in *Burns v. Richardson*, 384 U.S. 73 (1966), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

After, and because of, a number of procedural twists in the district court, the Thornton appellees were unsuccessful in persuading the district court that it should order the use of single-member districts as part of its interlocutory relief. They are, however, proceeding with their claims in the district court, with a view toward an eventual hearing on the merits in which they can establish that the multi-member districts in question are discriminatory. Accordingly, the Thornton appellees urge this Court to limit its consideration of this interlocutory appeal to the questions necessarily raised by the two appeals before the Court, and to avoid deciding questions which are not pressed by any appellants and which are not ripe for review.[1]

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[1] The Thornton appellees initially took an appeal themselves from the district court's interlocutory order, in which this Court noted probable jurisdiction. Thornton v. Prichard, No. 71-553. That appeal involved questions relating to the validity of the multi-member districts under not only the fourteenth and fifteenth amendments, but also under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The passage of time and changed circumstances, however, have led the Thornton parties to conclude that (1) as to the Voting Rights Act claim, the record is not in such form as would permit the adequate presentation and consideration of the complex questions involved, *see* Rescue Army v. Municipal Court of the City of Los Angeles, 331 U.S. 549 (1947), and (2) as to the *Whitcomb*-type fourteenth and fifteenth amendment claims, appropriate relief must come from the district court's proceeding to the merits rather than from an interlocutory appeal followed by a remand.

Accordingly, a motion to dismiss the appeal in No. 71-553 was made on July 14, 1972. Because the interests of the Thornton parties were and remain adverse to the interests of the Mahan appellants (State officials), this appellees' brief is being filed.

II.

The principal such question not before this Court is the question whether the multi-member districts have a discriminatory effect on black voters' right to cast effective ballots.

From March 1, 1971, when Chapter 116 was passed, the Thornton parties concentrated their efforts on attacking the multi-member districts in the forum provided by Congress under the Voting Rights Act, *i.e.*, by urging the Attorney General to enter an objection to the multi-member districts pursuant to section 5 of that Act, 42 U.S.C. § 1973c. Those efforts succeeded when, on May 7, 1971, the Attorney General did enter a section 5 objection to the multi-member districts in the five cities named above. On May 24, 1971, the district court held that the Attorney General's objection was dispositive, enjoined enforcement of Chapter 116, and gave the General Assembly three weeks to draw a new plan curing the Attorney General's objections.

On June 7, 1971, this Court held in *Whitcomb v. Chavis, supra,* that multi-member districts in Marion County, Indiana, had not been shown to discriminate. Three days later, on June 10, 1971, the Attorney General withdrew his section 5 objection to the multi-member districts in the five large Virginia cities. The district court hearing followed six days later.

In that brief time, the Thornton parties (who were now left only with a traditional *Whitcomb*-type fourteenth and fifteenth amendment claim) were able to establish some of the elements of proof that black voters in the five Virginia cities have "less opportunity than [do other Virginia] residents to participate in the political process and to elect legislators of their choice." *Whitcomb, supra,* at 149. They showed that there is a

history of discrimination against black voters in Virginia, and that black candidates have had notable lack of success in elections when pitted against white candidates.

Because of the shortness of time, however, there was no opportunity to prove other elements of their case against the multi-member districts. Those elements, which the Thornton parties are now preparing to prove in a trial on the merits in the district court, would include evidence that the history of disfranchising black voters in Virginia has left a legacy in which race plays a decisive role in politics, as shown by the unwillingness of many white voters to support candidates who are black or who are favored by black voters, the use of racial appeals in political campaigns, the inability of blacks to form coalitions with other interest groups, and, overall, the isolation of black voters as a specially disfavored permanent minority destined for constant defeat at the hands of the controlling (white) majority. In these circumstances, the Thornton parties would seek to show that the compensating advantage ordinarily enjoyed by a minority group in a multi-member district—*i.e.*, the ability to exercise some influence over a larger number of representatives—is effectively denied black voters because of their isolated position.[2]

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[2] As to Richmond (District 33), in particular, the evidence would also show that a recent annexation of some 46,000 white people has transformed the city into a five-member, majority-white district, from what would otherwise have been a four-member, majority-black district. The Attorney General has made and maintained a section 5 Voting Rights Act objection to the annexation on the ground that eliminating the black majority while maintaining at-large elections (for City Council) would have a discriminatory effect. *See* Holt v. City of Richmond, 406 U.S. 903 (1972). The Thornton appellees would seek to show in this case that the annexation likewise had a discriminatory effect on the at-large elections for the Richmond House of Delegates seats.

Proof of this sort should establish that the multi-member districts effectively abridge black voters' right to vote, and therefore should require a holding that the multi-member districts violate the fourteenth and fifteenth amendments. *See Graves v. Barnes,* ____ F. Supp. ____ (W.D. Tex. 1972) (three-judge court), *stay denied,* 405 U.S. 1201 (1972) (Powell, Jr.); *Sims v. Amos,* 336 F. Supp. 924 (M.D. Ala. 1972) (three-judge court); *Bussie v. Governor of Louisiana,* 333 F. Supp. 452 (E.D. La. 1971), *aff'd as to invalidity of multi-member districts,* 457 F.2d 796 (5th Cir. 1971). *Compare Taylor v. McKeithen,* ____ U.S. ____ (June 12, 1972); *Lipscomb v. Jonsson,* 459 F.2d 335 (5th Cir. 1972).

III.

The district court, in its interlocutory order, held Chapter 116 invalid on the ground that it included provisions "violating the equal protection clause of the Constitution of the United States." 330 F. Supp. at 1150. In its opinion, the court held that "the State has proved no governmental necessity for strictly adhering to political subdivision lines." 330 F. Supp. at 1140. The appellants urge that the district court decision be reversed and that this Court "affirm the validity" of Chapter 116. Brief on Behalf of Appellants in No. 71-364, p. 75.

Because of the posture of the case now proceeding in the district court, the Thornton appellees oppose the prayer of the appellants and urge this Court to limit any holding it may make to the precise facts and issues before it, without prematurely deciding any issue relating to the

question whether the multi-member districts in this case do or do not discriminate against black voters.[3]

Respectfully submitted,

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[3]This case is ripe, however, to decide whether the use of multi-member districts (at-large or floterial) which *combine* political subdivisions is rational. Under Chapter 116, 15 multi-member districts contain such combinations (Nos. 1-3, 6, 8, 9, 11, 13, 15-17, 20, 24, 26 and 36), in addition to four floterial districts. The district court's plan continued this pattern, but aggravated it by combining pieces of subdivisions in multi-member districts, most notably in District No. 39, where a part of Virginia Beach was added to Norfolk in a seven-member district.

Such a plan is irrational because the only justification for multi-member districts is the desire to keep a single political subdivision together. *See* Abate v. Mundt, 403 U.S. 182 (1971); Lucas v. Colorado General Assembly, 377 U.S. 731 n. 21 (1964). Combining subdivisions in multi-member districts does nothing to preserve the territorial integrity of any of the components, and this Court has never upheld such a technique against a square attack (although it has discussed the technique in some cases without condemning it, *e.g.*, Davis v. Mann, 377 U.S. 678, 686-87 (1964)). For the reasons set forth at pp. 26-32 of the brief of appellant City of Virginia Beach (No. 71-373), this Court should hold that, even without regard to racial considerations, a multi-member district is presumptively valid only where it comprises but a single political subdivision. Any other use of multi-member districts achieves only mathematical correctness at the expense of political reationality.